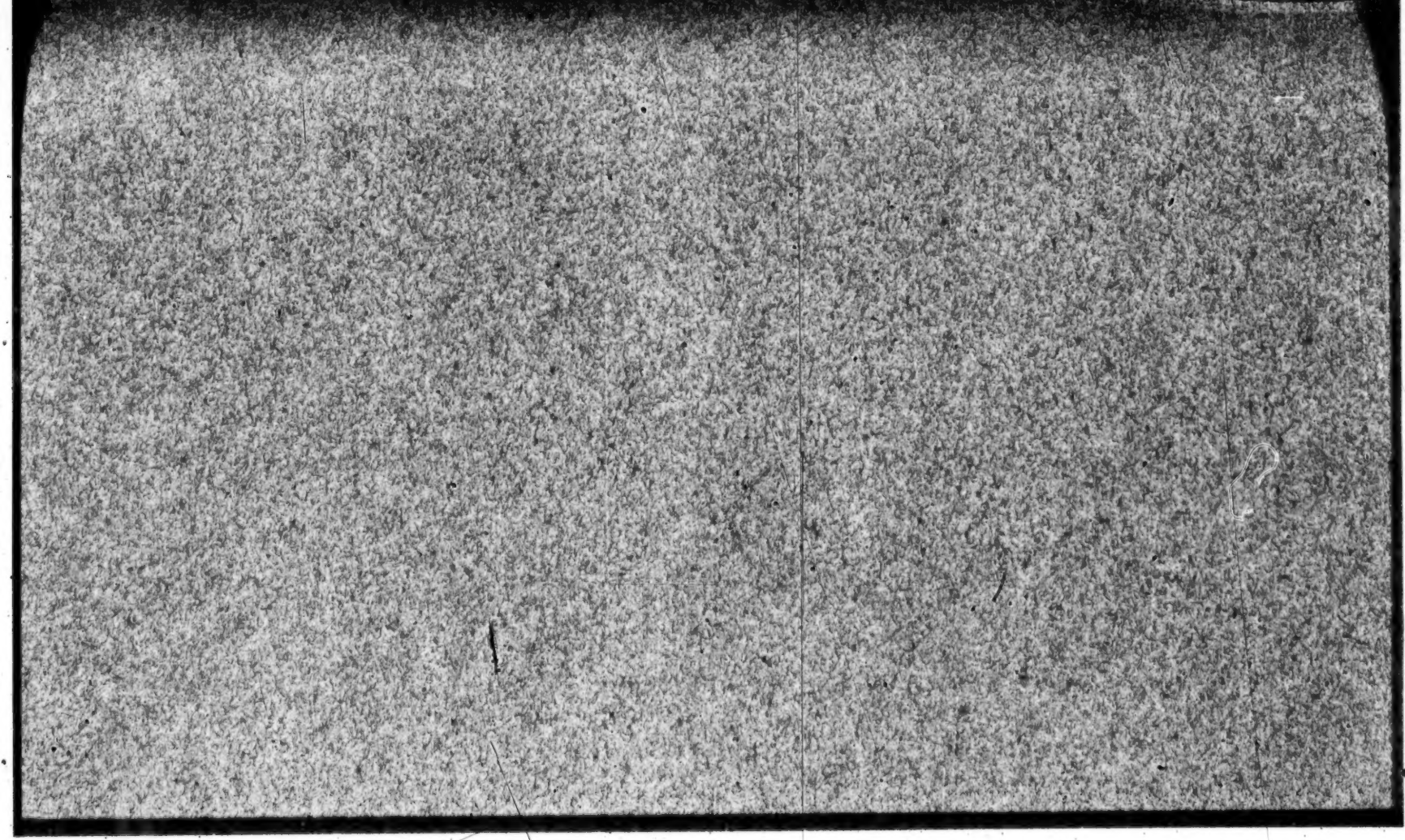

FILE COPY

FEB 25 1931
CHARLES ELMORE CROP
CLERK

Nos. 202 and 203

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SALLIE H. HENRY

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE ESTATE OF WILLIAM W. PORTER, DECEASED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	3
Statement	6
Specification of errors to be urged	7
Argument	7
Conclusion	8

CITATIONS

Cases: *David Burnet, Commissioner of Internal Revenue, Petitioner, v. Samuel F. Houston*, No. 199, October term, 1930	6, 7, 8
Statutes:	
Revenue act, 1921, c. 136, 42 Stat. 227, 229–230, 239–240—	
Sec. 202 (a) (b)	3–4
Sec. 214 (a)	4
Treasury Regulations 62 (1922 ed.), promulgated February 15, 1922, under the revenue act of 1921, Art. 1561	4–6

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 202

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

SALLIE H. HENRY

No. 203

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, Executors of the Estate of William W. Porter, deceased

---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

No. 202

The opinion of the Circuit Court of Appeals (R. 56) is reported in 39 F. (2d) 358. The opin-

ion of the Board of Tax Appeals (R. 15) is reported in 13 B. T. A. 279.

No. 203

The opinion of the Circuit Court of Appeals (R. 55) is reported in 39 F. (2d) 360. The opinion of the Board of Tax Appeals (R. 14) is reported in 13 B. T. A. 279.

JURISDICTION

No. 202

The judgment of the Circuit Court of Appeals was entered March 17, 1930. (R. 58.) The petition for a writ of certiorari was filed in this Court on June 17, 1930. (R. 59.) Certiorari was granted October 13, 1930.

No. 203

The judgment of the Circuit Court of Appeals was entered March 18, 1930. (R. 57.) The petition for a writ of certiorari was filed in this Court on June 18, 1930. (R. 57.) Certiorari was granted October 13, 1930.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was it incumbent upon the respondent to establish the March 1, 1913, value of a property right acquired prior to that date to support a claim for

a deductible loss on the disposition of such property in 1921?[1]

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 229–230, 239–240, provided in part:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property • • •
>
> (b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but—
>
> • • • • •
>
> (2) If its fair maket price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor. • • •
>
> (3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1,

[1] In the *Henry* case, No. 202, a further question was raised in the court below as to the sufficiency of the evidence to support the Board's conclusion that Samuel F. Houston acted as the respondent's agent in making final settlement with the trust company. As this question was not of public importance, consideration of it was not requested in the petition for certiorari.

1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit. * * *

Treasury Regulations 62 (1922 edition), promulgated February 15, 1922, under the Revenue Act of 1921:

ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property, the basis is the cost of such property, or in the case of property which should be included in the inventory, its latest inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain to be included in gross income is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or loss is recognized in the case of property sold or exchanged (a) at more than cost

but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1, 1913. * * * What the fair market value of property was on March 1, 1913, is a question of fact to be established by any evidence which will reasonably and adequately make it appear. * * *

* * * * *

Illustrations of the computation of gain or loss from the sale or exchange of property acquired prior to March 1, 1913.—To avoid complexity no adjustment has been made in these examples for depreciation or depletion.

* * * * *

In the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor.

Cost	Fair market value Mar. 1, 1913	Sale price	Deductible loss
$10,000	$5,000	$3,000	$2,000. Excess of fair market value over amount realized. Loss attributable to the period prior to Mar. 1, 1913, not deductible.

* * * * *

No gain or loss is recognized in the case of property acquired before March 1, 1913, and sold or disposed of at less than cost but at more than its fair market value as of that date.

Cost	Fair market value Mar. 1, 1913	Sale price	
$10,000	$3,000	$5,000	No taxable gain or deductible loss. Reason: A loss on whole transaction, which loss is attributable to period prior to Mar. 1, 1913.

STATEMENT

The facts in these cases are identical with those in *David Burnet, Commissioner of Internal Revenue, Petitioner,* v. *Samuel F. Houston,* No. 199, October Term, 1930, now pending in this Court, except that the tax year here involved is 1921 and as to the following matters of detail:

No. 202

The respondent advanced $200,000 to the Real Estate Trust Co. in 1906, through her brother, Samuel F. Houston. (R. 12.) She received 158.61 shares of Pennsylvania Sugar Company stock in 1921. (R. 14.) The amount of loss which she deducted, but which the Commissioner of Internal Revenue disallowed was $176,840.28. (R. 7.) The amount of the tax deficiency involved is $100,870.29. (R. 10.)

No. 203

The decedent, William W. Porter, advanced $75,000 to the Real Estate Trust Co. in 1906. (R. 11.) He received 54 shares of the Pennsylvania Sugar Company stock in 1921. (R. 18.) The amount of loss which he deducted, but which the Commissioner of Internal Revenue disallowed, was

$66,900. (R. 14.) The amount of the tax deficiency involved is $7,268.60. (R. 10.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred—

1. In failing to hold that only those losses are deductible from gross income which are sustained after March 1, 1913.

2. In failing to hold that the ascertainment of the March 1, 1913, value was necessary for the purpose of apportioning the total loss between the periods before and after March 1, 1913.

3. In holding that the deductible loss was the difference between the cost of the right in 1906 and the amount subsequently realized, there being no evidence that any portion of said loss had been sustained subsequent to March 1, 1913.

4. In failing to hold that the burden was upon the respondent to prove the March 1, 1913, value of her property right to support a claim for a deductible loss.

5. In holding that under the facts in this case the respondent was relieved of the necessity of establishing the March 1, 1913, value of her property right.

ARGUMENT

The question presented in these cases is the same as that in *David Burnet, Commissioner of Internal Revenue, Petitioner* v. *Samuel F. Houston*, No. 199, October Term, 1930, now pending in this Court on a writ of certiorari to the Circuit Court of Appeals

for the Third Circuit. The question in the instant cases arises under Section 202 of the Revenue Act of 1921 (*supra*, pp. 3–4), which is even more explicit than the corresponding provision in the 1918 Act involved in the *Houston case*. See also the examples given in Article 1561 of Regulations 62 (*supra*, pp. 4–6), which are directly applicable to the situation here involved.

CONCLUSION

For the reasons urged in the *Houston case*, the decisions of the Circuit Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
A. H. CONNER,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
ALLIN H. PIERCE,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

FEBRUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931